NO. 87-504

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CURTIS MICHAEL RICHENDOLLAR
Appellant

V.

DIAMOND M. DRILLING COMPANY, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. SAMANIE
SAMANIE, BARNES & ALLEN
525 East Park Avenue
Houma, Louisiana 70364
Attorneys for Appellant
Curtis Michael Richendollar

JOSEPH J. WEIGAND, JR.
WEIGAND, WEIGAND & MEYER
Post Office Box 6062
7 Progressive Boulevard
Houma, Louisiana 70361
Attorney for Respondent
Diamond M. Drilling Company, Inc.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

I. Is 33 U.S.C. § 905(b) limited to maritime torts in the scope of its application?

II. Must a "vessel" under a 33 U.S.C. § 905(b) vessel negligence claim meet the definition of vessel under admiralty law?

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REFERENCE TO OPINIONS

This case was originally decided in Richendollar's favor by a three (3) judge panel at *Richendollar vs. Diamond M Drilling Co., Inc.*, 784 F.2d 580 (5th Cir. 1986).

Subsequently, the same court, sitting en banc, reversed the original decision as well as other decisions at *Richendollar vs. Diamond M. Drilling Co., Inc.*, 819 F.2d 124 (5th Cir. 1987).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 seeking review of a judgment of the United States Court of Appeal, Fifth Circuit, rendered and entered on June 16, 1987.

STATUTES AT ISSUE

33 U.S.C. § 905(b)

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies available under this chapter.[1]

33 U.S.C. § 902 Definitions

. . .

(21) Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat

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[1] 33 U.S.C. § 905(b) has since been amended. However, at the time of Richendollar's injury and at the time of trial the statute was as it is set forth here.

charterer, master, officer, or crew member.

. . .

28 U.S.C. § 1331

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1337

> a) The district courts shall have original jurisdiction of any civil action or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20(11) or section 219 of Part II of such Act (49 U.S.C. 318) only if the matter in controversity for each receipt or bill of laking exceeds $10,000, exclusive of interest and costs.
>
> b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20 (11) or section 219 of Part II of such Act (49 U.S.C. 318 originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, asn exclusive of any interest and costs to the plaintiff and, in addition, may impose costs on the plaintiff.

c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under Chapter 95 of this title.[2]

Congressional Record-Senate
See Appendix D, attached hereto

1982 U.S. Code Congressional & Administrative News
See Appendix C, attached hereto

[2] 28 U.S.C. § 1337 has since been amended, but there is no substantive changes that affect the issues of this case.

STATEMENT OF THE CASE

In 1979 Baker undertook to build for Diamond M a jackup drilling rig, the DON E. MCMAHON. The rig was constructed in Baker's shipyard near Arkansas Pass at Engleside, Texas. The work began in November of 1979; delivery was scheduled for June, 1980, but construction fell behind schedule. It was important to Diamond M for business reasons, to take delivery of the platform before the end of 1980 and to have it ready for transport to a site off the west coast of Africa in early 1981.

Because of the unexpected delay, Baker and Diamond M agreed that Diamond M could assign a crew to preload the drilling rig and prepare it for operation simultaneously with the Baker employees completing the construction. Typically, "rigging up" by Diamond M employees would be accomplished after the shipyard personnel finished their work and the vessel was delivered. It was understood that in rigging up, Diamond M employees would not interfere with the work of Baker personnel.

Diamond M sent Richendollar as a welder and part of a seventeen man Diamond M crew to prepare the DON E. MCMAHON for oil and gas drilling operations.

On October 17, 1980 the DON E. MCMAHON was eighty-five (85%) percent complete, but was not capable of navigation. Richendollar was ordered to weld a "hose station" on the starboard side. As he was welding to accomplish this task, the workbasket floor in which he was positioned gave way causing him to fall approximately twenty feet to the ground, sustaining serious injuries to his back and left wrist. The workbasket was poorly designed and constructed.

Suit was brought on behalf of Richendollar asserting

jurisdiction under 28 U.S.C. § 1332 and seeking recovery for damages against Diamond M Drilling Co., Inc. under 33 U.S.C. § 905(b).

Trial was had to a jury which found that the jackup drilling rig was a vessel under 33 U.S.C. § 905(b), and that Richendollar was injured as a consequence of vessel negligence. The United States Court of Appeal, Fifth Circuit, affirmed the lower court's judgment as to the liability of Diamond M. *Richendollar v. Diamond M Drilling Company, Inc.*, 784 F.2d 580 (5th Cir. 1986).

Subsequently that decision was reversed by the Fifth Circuit sitting en banc. *Richendollar v. Diamond M Drilling Company, Inc.*, 819 F.2d 124 (5th Cir. 1987). In that decision the court held that the DON E MCMAHON was not a "vessel" under the perview of 33 U.S.C. § 905(b) in that it did not satisfy maritime jurisdictional requirements. The court further held that tort actions under § 905(b) are limited to maritime torts as defined by *Executive Jet Aviation, Inc. vs. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). Richendollar now petitions this Court for a writ of certiorari to the lower court in order that this matter can be reviewed.

It should be noted that notwithstanding the amendment of § 905 (b), the issues in this case are important and will have substantial future impact on the longshore industry.[3] This Court's response will determine whether § 905(b) has any application to the shipbuilding aspect of this industry and whether the stated purpose of the statute (i.e. to promote safety in the longshore industry by making

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3. To this writer's knowledge, there are at least two other cases with similar issues making their way to this Court: *Rosetti vs. Avondale Shipyards, Inc.*, No. 83-3607, United States Court of Appeal, Fifth Circuit and *Rochelle vs. Superior Boat Works*, No. 57954, Mississippi Supreme Court.

negligent boat owners answerable for their actions or omissions) will be realized in shipbuilding activities.

ARGUMENT NO. 1

33 U.S.C. § 905(b) CLAIMS SHOULD NOT BE LIMITED TO MARITIME TORTS.

Since the 1972 amendments to the Longshoremen and Harbor Worker's Compensation Act and the birth of § 905(b) claims there has been confusion regarding the intent and application of § 905(b). As recognized in *May vs. Transworld Drilling Co.*, 786 F.2d 1261 (5th Cir. 1986), this has been in large part due to a failure to distinguish admiralty jurisdiction from the sufficiency of the evidence to establish a § 905(b) claim. Richendollar respectfully submits that a correct analysis of the plain language of § 905(b), its legislative history, and the relevant jurisprudence leads to the logical conclusion that § 905(b) actions are *not* limited to maritime torts.

Language of the Statute Itself

Carried to their logical conclusion the effect of *Drake vs. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985), cert. denied __ U.S. __, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986) and *May vs. Transworld Drilling, Inc.*, supra, would be to jurisprudentially repeal a portion of § 905(b).

Based upon the plain language of the statute itself, § 905(b) clearly was enacted to apply to shipbuilders as well as stevedores and other types of longshoremen.[4] It is

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4. Even amended, § 905(b) would still apply to shipbuilders injured by negligent ship owners who are not employers of the shipbuilders.

equally clear that shipbuilding is *not* a traditionally maritime activity. *Hollister vs. Luke Construction Company,* 517 F.2d 920 (5th Cir. 1975). Therefore, shipbuilders injured in the course of their employment could not fall under admiralty jurisdiction because they could not satisfy the two prong test set forth in *Executive Jet Aviation vs. Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 454 (1972) and its progeny. The holding of *Drake* and *May* which § 905(b) requires a maritime tort would effectively eliminate "shipbuilders" from the coverage of § 905(b) and would render that part of the statute meaningless and void. This judicial repeal of a portion of § 905(b) would be an obvious infringement upon the legislative powers granted by the United States Constitution to the Congress.

Legislative History and Intent

Any discussions of legislative intent must begin with a recognition of the purpose of the 1972 amendments to the LHWCA. As evidenced by the legislative history and numerous decisions, a primary purpose of the amendments was to eliminate the maritime theory of unseaworthiness from the remedies available to longshoremen and to prohibit the vessel from recouping any damages to a longshoreman for which it may be liable from that longshoreman's employer based upon a breach of said employer's warranty of workmanlike performance to the vessel. In other words, the amendments were primarily intended to cure the "problems" created by the past decisions of *Sea Shipping v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) and *Ryan Stevedoring Co. vs. Pan-Atlantic Steamship Corp.,* 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956) which had rendered a longshoreman employer indirectly liable for damages to an injured longshoreman who sued the vessel under the unsea-

worthiness doctrine in addition to workman's compensation benefits. Senate Bill No. 2318 on October 14, 1972 in the Congressional Record-Senate, pages 36272-36273; 1972 U.S. Code Congressional & Administrative News, page 4701-4705; see also *Parker vs. South Louisiana Contractors, Inc.*, 537 F.2d 113, 117 (5th Cir. 1976).

In its discussion of the 1972 amendments to the LHWCA found in the Congressional Record-Senate, October 14, 1972, pages 36272 and 36273, Congress reasoned that:

> "Given the improvement in compensation benefits which this bill would provide, it was our view that it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits."

Any analysis of Congressional intent behind § 905(b) must never lose sight of this purpose. Clearly, § 905(b) was primarily intended to curtail remedies available to injured longshoremen only insofar as the elimination of the maritime theory of unseaworthiness. Nowhere is there any evidence that Congress sought to limit or curtail the negligence remedy actions authorized by § 905(b).[5] As will

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5. On the contrary, the Congressional Record-Senate for October 14, 1972, states on page 36273 that negligence actions against vessels will meet the objective of encouraging safety by making vessels responsible to take corrective action where they know of or should know about a dangerous condition. Richendollar submits that this objective is best achieved by a liberal application of the § 905(b) negligence remedy rather than curtailment of that remedy.

be shown later, it seems that some of the case law has misinterpreted the intent of § 905(b) as limiting or curtailing both negligence actions as well as unseaworthiness claims.

While much of the discussion in the Congressional Record concerning third party actions has been emphasized by various appellate courts as well as the United States Supreme Court, there has been no analysis or even acknowledgment of the entire concluding paragraph of that discussion which states that:

> "It is not intended that the *negligence remedy authorized in the bill* shall be *applied differently in different ports depending upon the law of the state* in which the port may be located. Legal questions which may arise in actions brought under these provisions of the law should be determined as a matter of *Federal law.* In that connection, it is intended that *the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence,* shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, *the admiralty assumption of risk in an action by an injured employee shall also be applicable.*" (emphasis added).

This paragraph gives important insight as to the real intent of Congress in enacting § 905(b). If Congress had indeed intended to adopt or preserve *only* a maritime negligence remedy, then surely it would not have referred to such a specific remedy generically as "the negligence remedy authorized in the bill". In fact, there would have been no need for the first two (2) sentences in the above paragraph. Why would Congress be concerned with uniformity among the coastal States if it was merely adopting or retaining a maritime negligence remedy? Isn't Maritime

Law uniform among the different states? Certainly, Congress was aware of this uniformity. Moreover, if Congress had intended to adopt only a maritime neglegence remedy for § 905(b) actions, then it would not have provided that § 905(b) actions should be determined as a matter of "Federal law" but instead would have specifically stated that such actions should be determined as a matter of "Maritime or Admiralty Law". Nor would it have been necessary to specifically adopt the admiralty concept of comparative neglegence and the admiralty exclusion of the defense of assumption of risk if, in fact, Congress had intended to limit § 905(b) to maritime torts. Those principles would automaticlly have been applicable to maritime torts.

For these reasons, it is impossible to rectify the intent shown by Congress with the decision of *Drake vs. Raymark Industries, Inc.*, supra which held that § 905(b) actions are limited solely to maritime claims and which was followed by the court in *May vs. Transworld Drilling Co.*, supra. Such a restrictive interpretation of the statute defeats its avowed purpose of promoting safety throughout all activities of the longshoring industry, even non-maritime activity such as shipbuilding.

Jurisprudence

Up until the present time, this Court has not specifically addressed the issues presented in this case. Accordingly, most of the discussion regarding jurisprudence involves the decisions of various lower courts.

Chronologically the first case to consider is *Parker vs. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir. 1976. In *Parker*, the plaintiff was employed as a truck driver for Atlas Truck Lines, Inc.. Diversity of citizenship was not present. Therefore, Parker had to rely on other jurisdictional grounds, i.e. admiralty, the Admiralty

Extension Act, or 28 U.S.C. § 1337. In the course of delivering a truck-load of pipe casing, he and his truck were required to cross the Atchafalaya River by barge. On the far side of the river a ramp which weighed several tons and rested on land was lowered by wenches to permit egress from the docking barge. Before driving his truck off the barge Parker was in the process of walking across the ramp and slipped in the unilluminated gap that ran longitudinally along the center of the ramp. The Court concluded that since Parker's accident occurred on a land based structure most closely resembling a dock or pier, his claim did not come within admiralty jurisdiction.

In the alternative, Parker further contended that even if his claim was not cognizable in admiralty, passage of the 1972 amendments to the LHWCA had the effect of *extending admiralty jurisdiction* under the factural circumstances of his case. However, the court held that the legislative history relevant to § 905(b) indicated that Congress did not intend § 905(b) to create a new or broader cause of action in admiralty, citing the statutes history at 1972 U.S. Code Cong. & Admin. News page 4703.[6]

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6 *Parker vs. South Louisiana Contractors, Inc.*, supra, cites legislative history on page 117 of its opinion as follows:

"The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action in concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'non-delegable duty', or the like.

Persons to whom compensation is payable under the act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially enacted doctrine of unseaworthiness." Citing 1972 U.S. Code Congressional & Administrative News, page 4703.

Furthermore, in addressing jurisdiction under 28 U.S.C. Section 1337, the *Parker* court went on to hold that § 905(b) merely preserves an injured worker's right to recover damages from third parties in accordance with *nonstatutory negligence* principles and that an "appellant may not convert an ordinary tort claim into a federal cause of action by invoking a statutory provision such as § 905(b) as a predicate for § 1337 jurisdiction".[7]

It is submitted that a statutory negligence action such as § 905(b) qualifies as a civil action arising under an Act of Congress regulating commerce as required for jurisdiction under 28 U.S.C. § 1337 contrary to the holding in *Parker vs. South Louisiana Contractors, Inc.*, supra.

Moreover, it should be noted that *Parker* did not address the issue present in the case at bar (i.e. Is § 905(b) limited to maritime torts? Rather *Parker* only considered whether jurisdiction in that case would be predicated upon admiralty and general maritime law, the Admiralty Extension Act, the 1972 amendments to the LHWCA, or 28 U.S.C. § 1337. In that light the court held that in regard to third party negligence claims the 1972 amendments in § 905(b) did not *extend admiralty jurisdiction.* However, that

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(footnote 6 continued)
The court's emphasis seemed to be on the second of the above two paragraphs. However, the Senate Report on the 1972 amendments *completely omitted the second paragraph.* See Senate Bill No. 2318, October 14, 1972, Congressional Record-Senate, page 36273.

[7] Was this denial of § 1337 jurisdiction by *Parker* proper in light of the recognition by this Court in *Scindia Steam Navigation Company Ltd. vs. De Los Santos*, 101 S.Ct. 1651, 1621, 451 U.S. 156, 68 L.Ed.2d (1981), that § 905(b) provides a *statutory negligence action against the vessel?* By this recognition, this Court insured the fulfillment of the statute's intent to encourage safety in the longshoring industry by making vessels responsible to take corrective action when they know or should know about dangerous condition.

is not to say that § 905(b) curtails or limits its applicability solely to maritime torts. On the contrary, the legislative history and the implications of the court's consideration of § 1337 jurisdiction indicate otherwise.

Next came the decision of *Christoff vs. Bergeron Industries, Inc.*, 748 F.2d 297 (5th Cir. 1984). Christoff was employed as a welder by defendant, Bergeron Industries, Inc. which had contracted to build a barge. While under construction, this barge rested on a marine railway on and over the Mississippi River but was not in the water. Plainitff was injured when he fell into an unguarded hole in the deck of the barge. Plaintiff's claim was based on 33 U.S.C. § 905(b). In addressing the issue of federal subject matter jurisdiction, the court cited *Parker vs. South Louisiana Contractors, Inc.* as authority that § 905(b) neither extended admiralty jurisdiction nor provided a federal question independent of admiralty. Using the test set forth in *Excutive Jet Aviation, Inc. vs. City of Cleveland*, 409 U.S. 249, 268, 93 S.Ct. 493, 504, 34 L.Ed.2d., the court determined that since plaintiff Christoff was not injured "on navigable waters" but rather on a barge which was resting on a maritime railway above the river, there was no admiralty jurisdiction. However, like *Parker vs. South Louisiana Contractors, Inc.*, supra, diversity of citizenship was not present between the parties and, consequently, the *Christoff* court did not direct its attention to this jurisdictional basis nor whether § 905(b) claims are limited to maritime torts.

Most recently the case of *May vs. Transworld Drilling Co.*, supra was decided. May worked as a rigger for Litton Systems, Inc. which was building a number of drilling vesels. Plaintiff was injured while working in the shipyard moving fabricated steel that was to be installed as part of an unknown vessel. He brought a third party tort claim against his employer and/or Transworld Drilling Co. as the

owner(s) of the vessel, invoking diversity jurisdiction. The Court held that § 905(b) was intended to curtail rather than expand the availability of third party actions in admiralty and to preserve an injured worker's pre-existing right under general maritime law to recover for third party negligence. Consequently, the court reasoned, § 905(b) permits *only* the assertion of a maritime negligence action, erroneously citing as authority *Parker vs. South Louisiana Contractors, Inc.*, supra, *Christoff vs. Bergeron Industries, Inc.*, supra, *Holland vs. Sea-Land Service*, 655 F.2d 556 (4th Cir. 1981) cert. denied 455 U.S. 919, 102 S.Ct. 1274, 71 L.Ed.2d 459 (1982), *Harville vs. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984), and *Drake vs. Raymark Industries*, 772 F.2d 1007 (1st Cir. 1985), cert. denied ____ U.S. ____ 106 S.Ct. 1994, 90 L.Ed.2d 675(1986).

However, Richendollar respectfully submits that this reasoning of *May* is in error. First of all, while it is true that *Parker* did state that the primary purpose of § 905(b) was to curtail third party actions in admiralty, that curtailment involved the elimination of unseaworthiness actions and not the limitation of the negligence remedy authorized by the statute. Secondly, although the *Parker* court stated that § 905(b) was intended to preserve an injured worker's pre-existing right under general maritime law to recover for third party negligence, that is not to say that § 905(b) limits or restricts an injured longshoreman to that pre-existing maritime claim. Neither *Parker vs. South Louisiana Contractors, Inc.*, supra, nor its progeny *Christoff Bergeron Industries, Inc.*, supra, held that § 905(b) was limited to maritime torts.

The other authorities cited by *May vs. Transworld Drilling Co.*, supra, can also be distinguished:

In *Holland vs. Sea-Land Service, Inc.*, 655 F.2d 559 (4th Cir. 1981), Holland was employed as a longshoreman

by the Nacirema Operating Company and assigned to work at defendant's terminal transporting containers from storage on land to the pier for loading aboard a vessel. He was injured when he made a ninety degree turn onto the pier and his vehicle tipped over. The court noted that *Holland did not bring an action against the vessel, but rather sued Sea-Land as operator of the terminal and not as owner of any particular vessel.* In other words, § 905(b) was not even involved. The only issue before the court was the scope of federal admiralty jurisdiction.

In *Harville vs. Johns-Manville Products Corp.*, supra, the plaintiffs were past or present employees of the Alabama Dry Dock and Shipbuilding Company who had sustained injuries as a result of asbestos exposure over a period of many years. The issue in *Harville* was one of choice of law rather than of jurisdiction. Diversity jurisdiction was properly invoked by the parties. However the plaintiffs urged the court to apply substantive federal law of admiralty rather than the law of Alabama to their claims. After an indepth choice of law analysis, the court concluded that the plaintiffs' claims were not cognizable under federal maritime jurisdiction. Accordingly, there was not justification for supplanting state tort law with the substantive law of admiralty. As in *Holland vs. Sea-Land Services, Inc.*, supra, the court took notice that the plaintiffs made not claims against vessels but rather agianst third parties other than vessels and, therefore, reasoned that § 905(b) was inapplicable. As in *Holland, the issue was whether plaintiff's claim was governed by State or admiralty law.*

In Drake vs. Raymark Industries, Inc., supra, Drake was an employee of Bath Iron Works Corporation (BIW) which was involved in shipbuilding and the ship repair business. Plaintiff filed claim against defendant manufacturers and suppliers of asbestos products alleging personal

injury resulting from said products. Defendants filed third party claims against BIW alleging, among other things, that BIW was an owner or owner/pro hac vice of the vessels upon which plaintiff worked and consequently was liable to plaintiff for all damages claimed in his original complaints against defendant pursuant to 33 U.S.C. § 905(b). However, the plaintiff did not sue BIW as ship owner/owner pro hac vice pursuant to § 905(b). Instead the plaintiff filed a strictly non-maritime cause of action based upon diversity jurisdiction. Despite the non-maritime nature of the primary claims, the defendants asserted § 905(b) as a basis for indemnity or contribution from BIW. The court commenced its consideration of the third party 905(b) action by stating that "we doubt whether a contribution action premised solely upon § 905(b) can proceed without having as its predicate a § 905(b) primary action properly brought by one of the parties authorized by the statute". Nonetheless, the court went on to assume arguendo that the defendants were not barred from bringing a contribution action based upon the plaintiff's omission of 905(b) claim interaction in order to address the meat of the question, i.e. does 905(b) recognize only maritime torts regardless of the actual basis of jurisdiction or does its range encompass non-maritime torts occurring on a vessel but where the test for admiralty jurisdiction is not satisfied?

In answer to that question, the court began an analysis of the legislative and jurisprudential history of the term "maritime tort". The court correctly concluded that to be classified as a maritime tort the wrong had to fall within admiralty jurisdiction which in return requires that the wrong occur on navigable waters and involve a relationship to traditional maritime activity. The *Drake* court also discussed the remedy of unseaworthiness extended by *Seas Shipping Company vs. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). Based upon its review of the origin

and demise of the longshoreman's unseaworthiness action, the court concluded at page 1014 of its opinion that § 905(b) *implicitly* requires that a tort be consumated within the admiralty jurisdiction to be cognizable under the statute. In other words, the court concluded that § 905(b) claims are *impliedly* limited to maritime torts.

In support of its conclusion, the *Drake* court erroneously relied upon *Parker vs. South Louisiana Contractors,* supra, *Holland vs. Sea-Land Services,* supra, *Christoff vs. Bergeron Industries, Inc.,* supra, and *Harville vs. Johns-Manville Products Corp.,* supra, all of which have been discussed hereto fore. *Drake* chose not to follow *Lundy vs. Litton Systems, Inc.,* 625 F.2d 590 (5th Cir. 1980), cert. denied, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981), *McCarthy vs. The Bark Peking,* 716 F.2d 130 (2nd Cir. 1983), and *Hall vs. Hvide Hull No. 3,* 746 F.2d 294 (5th Cir. 1984) all of which support an opposite conclusion reached by the *Drake* court.

In *Drake,* there is some discussion of *Hall vs. Hvide Hull No. 3,* supra. The court looked to the legislative history in its discussion of *Hall.* In its discussion, it stated that "interpreting the scope of 905(b) jurisdiction to include negligence actions other than maritime torts would federalize torts in an area which currently are governed by state law. We find it difficult to believe that a move this momentus, had Congress intended it, would not have received explicit discussion". However, Richendollar submits that Congress did explicitly discuss such an intent in its concluding paragraph in the Congressional Record which has been analyzed earlier.

The *Drake* court also cited *Parker vs. South Louisiana Contractors, Inc.,* supra, in support of its proposition that "There is no evidence that Congress intended to extend § 905(b) tort jurisdiction to encompass the shoreside

injuries occurring on a vessel merely because those injuries would be compensable under the LHWCA", (emphasis added). *Drake's* synopsis of *Parker's* holding is not accurate Contrary to *Drake's* interpretation, *Parker* held only that Congress did not intend to expand admiralty jurisdiction. *Parker* did not hold that § 905(b) required admiralty jurisdiction. In fact, as stated before, it implied otherwise by its consideration of 28 U.S.C. § 1337 jurisdiction.

Summary

How does the plain language of the statute, legislative history and the jurisprudence interrelate? How should we fit the pieces together?

First of all, there are policies which guided Congress in its enactment of § 905(b) which should be ahered to in order to fulfill the intent of that statute. Perhaps the most important is the longshoring safety incentive which was born out of the vessel's responsibility to take corrective action where it knows or should have known about a dangerous condition. If it fails to do so, the vessel would be liable to the injured longshoreman. It must be remembered that Congress could have done away with all third party claims and restricted injured longshoremen only to worker's compensation benefits. However, with the intent of promoting safety, it did not do so. Instead it required vessels to be held accountable for their own negligence. Nowhere in the Senate Report which discusses the amendments does Congress indicate that it was restricting this accountability to maritime torts. To do so circumvents the intent of Congress and leads to gaps in longshoring safety such as would result in this case. For example, Richendollar was involved in shipbuilding activity in a Baker Marine construction yard on a Diamond M vessel. It was determined that Baker had no responsibility whatsoever for the safety of shipbuilders such as Richendollar. To say

that Diamond M, as a vessel owner involved directly in shipbuilding activity, is also not responsible for the safety of the shipbuilders, leaves them in a safety "gap" and contravenes the policy behind § 905(b). In that instance, Richendollar not only has to risk the negligence of his co-shipbuilders (a risk that is balanced by his compensation rights) but he must also risk the negligence of the vessel owner who is active on the site and who has primary responsibility for safety on the site. Obviously, safety can best be encouraged by holding vessel owners, such as Diamond M, responsible for their own negligent acts regardless of whether or not a maritime tort is involved.

Another policy is that of uniformity. Congress did not intend a shipbuilder's negligence to be applied differently from state to state. Limiting § 905(b) actions to maritime torts does just that. It relegates injured shipbuilders (who could rarely, if ever, satisfy the test for a maritime tort) to whatever rights they may have against vessel owners pursuant to the situs state law. On the other hand, recognizing that Congress intended § 905(b) negligence actions to be determined as a matter of Federal law rather than just Maritime law would bring uniformity to this area of law.

A lot has been said about the intent of Congress in enacting § 905(b). Perhaps that intent has best been illustrated by the inclusion of shipbuilders within the coverage scope of the statute. If Congress intended *only* to legislatively overrule *Seas Stevedoring Co. vs. Pan Atlantic Steamship Corp.*, supra, then it would have limited the coverage of § 905(b) to stevedoring because *Sieracki* and *Ryan* were the products solely of stevedoring, not shipbuilding operations. Those cases had no real application to shipbuilders because they required admiralty jurisdiction which was generally not present in shipbuilding activities. Consequently, by including shipbuilders within the scope

of § 905(b), Congress did not *preserve* any maritime remedies for shipbuilders because there was nothing to preserve. Shipbuilders did not enjoy the protection of any prior maritime remedies. Insofar as shipbuilders are concerned, Congress instead created a statutory negligence action under Federal law in order to accomplish its purposes. To hold otherwise would eliminate "shipbuilders" from the coverage of § 905(b) and accomplish a result that Congress specifically sought to avoid.

Finally, the only cases which have held that § 905(b) is limited to maritime torts are *Drake vs. Raymark Industries, supra, and May vs. Transworld Drilling,* supra. For support those cases rely directly or indirectly upon *Parker vs. South Louisiana Contractors, Inc.,* supra, which has been previously clarified and distinguished, as well as alleged "implicit" requirements of § 905(b). However, Richendollar submits that the language of § 905(b), the legislative history and jurisprudence explicitly requires the opposite of what *Drake* and *May* held.

Therefore, analyzing the legislative history, the jurisprudence, and the very language of the statute itself, Richendollar respectfully submits that 33 U.S.C. § 905(b) is not limited to maritime torts.

ARGUMENT NO. 2

THE RIG DON E. MCMAHON WAS A VESSEL PURSUANT TO 33 U.S.C. § 905(b)

Much of the consideration set forth heretofore are also relevant to this issue. In addition, Richendollar submits the following:

Richendollar bases his claim against Diamond M

on 33 U.S.C. § 905(b) which is set forth as it was promulgated at the time of Richendollar's injury and trial of this case. Subsequent to trial of this matter the statute was amended resulting in the deletion of shipbuilding, repairing, or breaking services from the coverage of the statute in those instances where the victim's employer was the owner of the vessel. In this case, notwithstanding several prior decisions defining a § 905(b) "vessel" utilizing the definition of vessel found at 33 U.S.C. § 902(21)[8], the United States Court of Appeals, Fifth Circuit, defined "vessel" based upon general maritime principles. However in doing so, Richendollar respectfully submits that the appellate court defeated the purpose and intent of the statute. By its very terms, § 905(b) specifically provided a negligence remedy to shipbuilders and repairers. Since shipbuilding activity includes all vessels without regard to whether or not said vessels can float, then § 905(b) by its very language authorized an action such as the case at bar. Such an approach also lends consistency to the Longshoreman Harborworkers' Compensation Act in that a "vessel" as defined by the LHWCA would be defined the same throughout all provisions of the Act including § 905(b).

Moreover the legislative history set forth in Public Law 92:576, 1972 U.S. Code Congressional and Administrative News, page 4698 states that § 905(b) was enacted to eliminate the *Sieracki* unseaworthiness action and to place the vessel in the same position as a third party causing a land-based tort. Also, in the discussion of § 905(b) presented in Senate Bill No. 2318 on October 14, 1972 at

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[8] *Lundy vs. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir. 1980), cert, denied, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981); *Trussel vs. Litton Systems, Inc.*, 753 F.2d 366, 367 (5th Cir. 1985).

the Congressional Record-Senate, page 36273, it was stated:

> The committee recognized the need for special provisions to deal with a case where a Longshoreman or *shipbuilder* or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yacca*, 373 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The rights of an injured longshoreman or *shipbuilder* or repairman should not depend on whether he was employed directly by the vessel or by an independant contractor.
>
> Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of person engaged in performing longshoring services. *Similar provisions are applicable to shipbuilding or repair employees employed directly by the vessel. The same principle should apply in determining liability of the vessel which employs its own longshoreman or shipbuilders or repairmen as applied when an independent contractor employs persons.*
>
> *It is not intended that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the state in which the port may be located. Legal questions which may arise in actions brought under these provisions of the law should be determined as a matter of Federal law.*
> . . .(emphasis added).

As seen above, § 905(b) by its language and legislative history would provide a remedy to a shipbuilder

for damages caused by the negligence of the uncompleted vessel or its owner, whereas maritime law would not recognize such a remedy. The rationale of Congress was to improve industrial safety and reduce injuries in all aspects of the longshore industry. See Congressional Record-Senate, October 14, 1972, page 4705.

Therefore, it is clear that Congress by its enactment of § 905(b) intended more than just the elimination of the unseaworthy remedy of a *Sieraki* seaman and the statutory incorporation of a maritime negligence remedy. If that had been Congress' intent, then there would have been no protectional provisions of shipbuilders included in the statute since it is inconceivable that any shipbuilder would have a maritime negligence remedy. Shipbuilding by its very nature involves incomplete and non-floating vessels. On the contrary, the only way to give the shipbuilder provisions of the statute any meaning at all is to interprete the statute as granting or incorporating more than just a maritime negligence remedy.

It is also important to note that this Court, in the case of *Jones & Laughlin Steel Corp. vs Pfeifer,* 103 S.Ct. 2541 (1983) defined a § 905(b) vessel using the definition of said term at 33 U.S.C. § 902(21). In interpreting the statute the court emphasized the "plain language" of the statute. The lower court ignored this pronouncement in rendering the decision at bar.

In summary, Richendollar respectfully submits that the plain language of §905(b) would require only that a vessel qualify as such under the definition set forth at

§ 902(21) of the same act. Indeed this court has already stated that said definition is dufficient for purposed of the determination of a vessel under § 905(b). *Jones & Laughlin Steel Corp. vs. Pfeifer,* supra.

Respectfully submitted:

SAMANIE, BARNES & ALLEN
Attorneys at Law
525 East Park Avenue
Houma, Louisiana 70364
Telephone: (504) 868-8223

MICHAEL J. SAMANIE

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals, for the Fifth Circuit has been furnished to Joseph J. Weigand at P. O. Box 6062, 7 Progressive Boulevard, Houma, Louisiana, 70361, on this ____ day of _____, 1987.

_____

MICHAEL J. SAMANIE

APPENDIX A

Curtis Michael RICHENDOLLAR,
Plaintiff-Appellee,
Cross-Appellant,

v.

DIAMOND M DRILLING COMPANY, INC.,
Defendant-Appellant,
Cross-Appellee,

Baker Marine Corporation,
Defendant-Appellee.

No. 84-2492.

United States Court of Appeals,
Fifth Circuit.

March 5, 1986.

Worker sued his employer and shipyard for personal injuries sustained in fall while helping to prepare drilling rig for operations while rig was still under construction at shipyard. Jury returned verdict for worker against employer and relieved shipyard from liability, and assessed damages at $1,031,015 with stipulated compensation intervention of $86,024. The United States District Court for the Southern District of Texas, Hayden W. Head, Jr., J., ordered remittitur of $300,000 which worker accepted without protest. Both parties appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) whether worker was invitee of shipyard with respect to workbasket was question for jury; (2) evidence supported finding that shipyard was not negligent; (3) employer failed to provide worker with safe workplace, and therefore, was liable; and

(4) worker was entitled to interest for that portion of damage award which accrued prior to entry of judgment.

Affirmed in part, vacated and remanded in part.

Clark, Chief Judge, filed concurring and dissenting opinion.

Joseph J. Weigand, Jr., Weigand, Weigand & Meyer, Houma, La., for Diamond M Drilling Co.

White, Huseman, Pletcher & Powers, Bradford M. Condit, Corpus Christi, Tex., for Diamond M Drilling, Inc.

Herbert W. Barnes, Michael J. Samanie, Houma, La., for Richendollar.

Richard A. Schwartz, Thelem, Marrin, Johnson & Bridges, Houston, Tex., for Baker Shipyards, Inc. & Baker Marine.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, POLITZ, and JONES, Circuit Judges.

POLITZ, Circuit Judge:

Invoking diversity jurisdiction and asserting claims for: vessel unseaworthiness under general maritime law, injury to a member of the crew of a vessel under the Jones Act, and vessel negligence under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), Curtis Michael Richendollar sued his employer, Diamond M Drilling Company, and Baker Marine Corporation, a shipyard, for personal injuries sustained in a fall. The

claims under the Jones Act and general maritime law were voluntarily dismissed.[1] The case was bifurcated for trial, tried first to the jury on liability and then on the quantum of damages. The jury returned a verdict for Richendollar against Diamond M but relieved Baker from any liability. Damages were set at $1,031,015 with a stipulated compensation intervention of $86,024. The trial court ordered a remittitur of $300,000 which the plaintiff accepted without protest. Both parties appeal. For the reasons assigned, we affirm all respects of the judgment except that relating to pre-judgment interest which we vacate and remand.

FACTUAL BACKGROUND

In 1979 Baker undertook to build for Diamond M a jackup drilling rig, the DON E. McMAHON. The rig was constructed in Baker's shipyard near Aransas Pass at Ingleside, Texas. The work began in November 1979; delivery was scheduled for June 1980, but construction fell behind schedule. It was important to Diamond M, for business reasons, to take delivery of the platform before the end of 1980 and to have it ready for transport to a site off the west coast of Africa in early 1981.

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[1] Richendollar initially filed only Jones Act and unseaworthiness claims. Diamond M was then paying LHWCA benefits but promptly reduced benefits to maintenance. Richendollar filed a longshoreman's claim with the Department of Labor and the Administrative Law Judge found him

Because of the unexpected delay, Baker and Diamond M agreed that Diamond M could assign a crew to preload the drilling rig and prepare it for operations simultaneously with the Baker employees completing construction. Typically, "rigging up" by Diamond M employees would be accomplished after the shipyard personnel finished their work and the vessel was delivered. It was understood that in rigging up, Diamond M employees would not interfere with the work of Baker personnel.

Diamond M sent a 17-man crew, under its area manager. Bob Hart, to prepare the DON E. McMAHON for oil and gas drilling operations. The crew was supervised by a toolpusher, Roy Harrelson, who reported to Hart. Baker exercised no authority or control over Diamond M employees. The two crews were completely discrete and independennt. The only commonality was that they all worked on or around the DON E. McMAHON. Richendollar was a welder on the special outfitting crew.

On October 17, 1980, the DON E. McMAHON was 85% complete, on land, positioned on blocks. It had holes in its hull and was not capable of navigation. Harrelson ordered Richendollar and another Diamond M employee to weld a "hose station" on the starboard side. Richendollar located a work basket, a wire-screen basket he had seen others use, and tack-welded it to the rig to serve as his work platform while welding the hose station. As Richendollar was welding, the other employee jumped into the basket. The bottom of the basket, faultily welded and improperly designed, broke loose and Richendollar fell to the ground, sustaining injuries to his back and left wrist.

The evidence does not establish the owner or custodian of the basket when Richendollar took possession of it. The basket did not match those used by Baker employees. Richendollar did not get it from Baker and did not know

who previously had used it. On the date of the aaccident, there were more than a dozen other companies working in the vicinity of the DON E. McMAHON. The basket could have belonged to any of them or to another company long-gone from the shipyard.

At conclusion of the liability phase, the jury cast Diamond M in judgment, finding that the DON E. McMAHON was a vessel and that negligence of the vessel was solely responsible for Richendollar's injuries. The jury exonerated Baker, finding that the shipyard neither owned nor controlled the basket, that it was not negligent, and that Richendollar was a shipyard licensee, not an invitee. The trial judge ultimately ordered a remittitur of $300,000 and denied prejudgment interest, concluding that even after the remittitur Richendollar had been "generously treated by the Jury" and "no additional recovery in the form of pre-judgment interest is supported by [Richendollar's] needs."

JURISDICTION

Jurisdiction must be noted. It would appear all have assumed that this case either presents a federal question, vesting 28 U.S.C. § 1331 jurisdiction, or rests on admiralty jurisdiction. Both assumptions are erroneous; there is neither federal question nor admiralty jurisdiction.

In *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir. 1976), *cert. denied*, 430 U.S. 906, 97 S.Ct. 1175, 51 L.Ed.2d 582 (1977), we first addressed the jurisdictional aspects of the 1972 Amendments to the LHWCA, specifically § 5(b) of that Act, 33 U.S.C. § 905(b). We there held "that Congress did not intend section 905(b) to create a new or broader cause of action in admiralty.... Taken as a whole, the manifest purpose of section 905(b) is to curtail rather than expand the availabilty of third party

actions in admiralty. With respect to third party actions for negligence, ... the boundaries of maritime jurisdiction as defined under prior law *(e.g. Victory Carriers* [404 U.S. 202, (1971)]) were neither expanded nor constricted...." *Id.* at 117. In *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971), the Supreme Court restated the traditional rule:

> The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States.

Id. at 205, 92 S.Ct. at 421 (*citing Thomas v. Lane,* 23 F.Cas. 957 (C.C.Me1813) (Story, J.)).

[1] Citing *Parker,* we recently restated in *Christoff v. Bergeron Industries, Inc.,* 748 F.2d 297, 298 (5th Cir. 1984) "that § 905(b) neither extended the boundaries of traditional admiralty jurisdiction nor converted ordinary tort claims against vessels into federal questions independent of admiralty." Accordingly, the presentation of a claim under § 905(b) does not automatically raise a federal question cognizable under 28 U.S.C. § 1331. The nature of the underlying claim must be considered, for that claim determines whether there is federal subject matter jurisdiction.

[2] Here, the underlying claim is a tort action for personal injuries against the owner of a vessel under construction and the owner of a shipyard constructing the vessel. Unless the claim rests in admiralty there is no § 905(b) jurisdiction. That determination is essentially fact-bound and turns on an inquiry into the geographic location of the tort and the activity involved. As we observed in *Christoff,* 748 F.2d at 299:

> Before 1972, the test for admiralty jurisdiction over torts was purely geographic: if the tort occured on navigable waters, admiralty jurisdiction was present. *Hall v. Hvide Hull No 3*, 746 F.2d 294, 303 (5th Cir.1984).... Then, the Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268, 93 S.Ct. 493, 504, 34 L.Ed.2d 454 (1972), added the requirement "that the wrong bear a significant relationship to traditional maritime activity."

We need not resolve the nexus test, *i.e.*, whether rigging up the DON E. McMAHON for oil and gas drilling activities bears a "significant relationship to traditional maritime activity," *id.*, for it is apparent that the situs test is not met. The DON E. McMAHON was under construction on land and at the time of the accident. It was not in navigable waters. There is no federal admiralty jurisdiction for such an injury occurring on land. *Victory Carriers; Parker; Christoff.*

Finding a lack of federal question or admiralty jurisdiction is not fatal to this action, however, for we find the requisite diversity of citizenship jurisdiction, 28 U.S.C. § 1332, between Richendollar, a Louisiana citizen, and the corporate, non-Louisiana-citizen defendants. *Trussell v. Litton Systems, Inc.*, 753 F.2d 366 (5th Cir.1984).

ANALYSIS

A. *Claims against Baker Marine*

In his appeal of the judgment in favor of Baker, Richendollar complains of the jury charge relative to the determination of his status as an invitee or licensee in the Baker shipyards, and of the adequacy of the evidence on that issue and on the question of Baker's negligence. Finding no merit in any assignment of error, we affirm the

judgment as to Baker.

Richendollar contended at trial that he was an invitee on Baker's premises and that Baker was negligent in failing to provide him a safe place to work. Baker countered that Richendollar was using a basket which it neither owned nor controlled and, as to the basket, was therefore merely a licensee. Consistent with that status, Baker maintains that its only obligation was to avoid injuring Richendollar through willful or wanton conduct. The trial court submitted interrogatories to the jury about Baker's ownership or control of the work basket, and asked whether Richendollar was Baker's invitee or licensee with respect thereto. The jury responded that Baker neither owned nor possessed the basket and that Richendollar was a licensee. The judge instructed the jury on Texas law respecting invitees and licensees. No objection was made to this part of the charge which, under Fed.R.Civ.P. 51, we review only for plain error which might result in a miscarriage of justice. *Williams v. Hoyt*, 556 F.2d 1336 (5th Cir.1977), *cert. denied*, 435 U.S. 946, 98 S.Ct. 1530, 55 L.Ed.2d 544 (1978).

[3] The pertinent parts of the jury charge on the invitee/licensee issue include:

> Specifically, the plaintiff complains that Baker was negligent to him as an invitee, saying that Baker had a duty to use reasonaable care . . . to make and keep the premises safe for persons invited to use the premises. If the plaintiff was on premises over which the defendant had control, defendant-Baker, or which Baker owned and the plaintiff was there with Baker's knowledge and for the mutual benefit of the plaintiff and Baker, then the plaintiff is an invitee. It's not necessary that the invitee be expressly issued an invitation to come onto the premises, but that invitation may be implied under the circumstances, but

there has to be more than mere acquiescence, that is, mere sufferance for somebody to be there.

To be successful on his claim that he was an invitee, Mr. Richendollar must prove that he was an invitee while occupying that basket; that is to say that it was Baker's basket or a basket controlled by Baker and present for the use of all who came along and inuring to the mutual benefit of the user and Baker.

Now, that mutuality of benefit is important here because if Mr. Richendollar does not prove himself to be an invitee, he is a licensee in this case.

The court then went on to explain that if Richendollar was an invitee as respects the basket, Baker had a duty to use reasonable care to assure that it was safe for the use intended and to warn on non-apparent, non-obvious dangers. If, on the other hand Richendollar was only a licensee, Baker would be liable only for willful or wanton conduct or conscious indifference.

As in all instances in which a part of the charge to the jury is challenged, we view the entire charge to see whether it is comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury." *Scheib v. Williams-McWillaims Co., Inc.*, 628 F.2d 509, 511 (5th Cir.1980). Applying that test we are convinced that the charge as given accurately reflects Texas law.

In *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452 (Tex.1972), the Texas Supreme Court adopted the rule enunciated in *Restatement (Second) of Torts* § 343 (1965). Under that rubric an occupier must exercise reasonable care to avoid the negligent injury of invitees, warning of latent dangers and making reasonabale inspections of the premises. The occupier generally had no duty to protect an

invitee from known or knowable dangers. *Adam Dantee; Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex.1963); *Harvey v. Seale*, 362 S.W.2d 310 (tex.1962). This Texas "no duty" doctrine evolved until it became incumbent upon a plaintiff to prove, in his case-in-chief, lack of knowledge of the dangerous condition. In *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex.1978), the Texas Supreme Court expressly abolished "the so-called no-duty concept" and announced that henceforth the liability of occupiers to invitees would be based on general principles of negligence and contributory negligence.*Id.* at 517, 519-21.

Texas law defines invitees as those who enter premises for the mutual benefit of the entrant and the occupier. *Galveston Oil Co. v. Morton*, 70 Tex. 400, 7 S.W. 756 (Tex.1888) (first adopting the mutual advantage test of invitee status); *Atchison, T. & S.F. Ry. v. Smith*, 563 S.W.2d 660 (Tex.Civ.App.—Waco 1978, *writ ref'd n.r.e.); Texas Power & Light Co. v. Holder*, 385 S.W.2d 863 (Tex.Civ.App.—Tyler 1964, *writ ref'd n.r.e.); Mendez v. Knights of Columbus Hall*, 431 S.W.2d 29 (Tex.Civ. App.—San Antonio 1968, *No writ).*

The duty to licensees is substantially less than that owed invitees. As the Texas Supreme Court stated in *State v. Tennison*, 509 S.W.2d 560, 562 (Tex.1974) (Citations omitted):

> [I]f the person injured was on the premises as a licensee, the duty that the proprietor or licensor owed him was not to injure him by willful, wanton or gross negligence . . . . An exception to the general rule is that when the licensor has knowledge of a dangerous condition, and the licensee does not, a duty is owed on the part of the licensor to either warn the licensee or to make the condition reasonable safe. . . . Texas has conformed to the generally recognized rule that the duty

> to warn licensees of dangerous conditions arises only in those instances where the licensor knows of the condition likely to cause injury.

[4] Finally, we review that part of the charge which was subjected to timely objection, the supplemental instruction concerning the duty of Baker with respect to control of the equipment of another on its premises. The court instructed:

> Baker Marine controls what it owns and possesses. . . . It controls all that it owns and possesses. It is not obligated to control equipment of outside contractors properly on its premises, although it can assume control by its conduct and can assume control by its agreement to do so.

This adequately distills Texas law. *See generally Oliver v. Snowden*, 426 S.W.2d 545 (Tex.1968).

The charge given to the jury fairly reflected the controlling provisions of Texas law. The jury received the guidance needed for a proper resolution of this dispute.

The challenge leveled by Richendollar as to the sufficiency of the evidence is not persuasive. We have frequently noted the applicable standard for review of sufficiency of the evidence assignments of error in civil cases. In *Carlton v. Shelton*, 722 F.2d 203, 205 (5th Cir.1984), we reminded:

> In determining the sufficiency of the evidence, we apply well-settled standards of appellate review. If the state of the proof is such that reasonable and impartial minds could reach the conclusion expressed in the jury's verdict, we must not disturb the jury's findings on appeal.

[5] Richendollar argues that there is insufficient evidence to support the finding that he was a licensee in the shipyard. Assuming *arguendo* that the basket was Baker's, a fact not established in this record, for entitlement to invitee status it would be necessary for Richendollar to show that his use constituted a profit or advantage for Baker. *Olivier.* The record contains ample evidence upon which the jury could have based its conclusion that Richendollar's use of the basket was not for Baker's gain or advantage but was solely related to Diamond M's interest in preparing the rig for transshipment and use immediately upon its release by the shipyard.

[6] Nor are we impressed by the contention that the evidence does not support the finding that Baker was not negligent. Pretermitting the question about ownership and control of the defective work basket, there is sufficient evidence in support of the jury finding. Richendollar was employed by Diamond M and dispatched to the DON E. McMAHON to do Diamond M work, using Diamond M equipment, under Diamond M supervisors, and following Diamond M safety practices and procedures. The Diamond M toolpusher, Roy Harrelson, was in charge of the overall operation, including safety procedures. There is an abundance of evidence from which the jury could find that Baker reasonable relied on Diamond M to guide and control its own crew and equipment in a manner consistent with meaningful safety practices.

B. Claims against Diamond M

Richendollar sued his employer under 33 U.S.C. § 905(b) as owner of the vessel, claiming vessel negligence. The limiting amendments to the LHWCA enacted in

1984[2] do not apply to Richendollar's accident, which occurred before adoption of the amendments. Prior to the 1984 amendments, an employee could recover compensation benefits from his employer and simultaneously seek tort damages against his employer, as vessel owner, under § 905(b).

Our dispositon of this appeal is largely guided by our recent decision in *Pichoff v. Bisso Towboat Co., Inc.*, 748 F.2d 300 (5th Cir.1984), in which we cited with approval the decision by our Second Circuit colleagues in *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789 (2d Cir.1979). In *Pichoff* the plaintiff was injured while repairing his employer's crewboat. A fuel tank located in the bilge was leaking. In supervising the work, Bisso's general manager told Pichoff to repair the fuel leak. Pichoff requested a "drop light." When none was immediately available, the general manager gave Pichoff a flashlight and ordered him to get about the task of readying the boat. Bisso was eager to complete repairs so the crewboat could be put into service and generate revenue. While working in the bilge, Pichoff was injured, and a vessel negligence suit under § 905 was ultimately filed.

Bisso argued that if it was negligent, it was negligent as a vessel repairer and not as an owner. Bisso's argument was rejected by this court, which noted that the trial court had found negligence in the failure to provide adequate lighting and in ordering Pichoff to proceed without delay

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[2] The LHWCA Amendments of 1984, Pub.L. No. 98-426 §§ 4(b), 5(a)(1)(b), 98 Stat. 1639, 1641 (effective September 29, 1984) amended 33 U.S.C. § 905(b) and proscribe the filing of a personal injury suit by one engaged in shipbuilding, repairing, or breaking services against his employer even though the employer is owner of the vessel. This charge affects only claims arising out of injuries occurring after the effective date of the amendments.

because of the tight schedule, resulting from what Bisso perceived to be its financial interests. The latter was considered a function of the vessel owner and not the vessel repairer. In holding Bisso liable under § 905(b) as vessel owner, we quoted the *Smith* observation that even during repair on longshoring operations, " 'supervisory personnel in particular will continue to fulfill their general duties as agents of the shipowner, and the negligent discharge of these responsibilities can still result in liability to the vessel.' " *Pichoff*, 748 F.2d at 303 (*quoting Smith*, 604 F.2d at 796 n. 5) We further held that even if Bisso was negligent in part as owner and in part as repairer, "its negligence as owner will support a judgment against it for all of Pichoff's damages. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 264, 99 S.Ct. 2758, 61 L.Ed.2d 521 (1979)." *Pichoff*, 748 F.2d at 303 n.4.

Richendollar's vessel negligence claim includes a contention that he was not furnished a safe place to work and that his supervisor, Roy Harrelson, was negligent, which negligence was imputed to Diamond M as vessel owner. In support of his contention that Diamond M, as vessel owner, was obligated to provide him a safe place to work, he cites *Scindia Steam Navigation Co. v. De. Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981); *Chiasson v. Rogers Terminal & Shipping Corp.*, 679 F.2d 410 (5th Cir. 1982); and *Pluyer v. Mitsui O.S.K. Lines*, 664 F.2d 1243 (5th Cir. 1982). The argument that the vessel owner must furnish a safe place to work is well-founded. The House Report on the 1972 amendments to the LHWCA, which added § 905(b), states:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing

> in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

H.R.Rep. No. 92-1441, 92d Cong. 2d Sess. 118, *reprinted in* 1972 U.S.Code Cong. & Ad.News 4698, 4704. Richendollar's suggestion that any negligent discharge of duties by the Diamond M supervisors (particularly by Roy Harrelson) can result in a finding of vessel negligence is likewise well-founded to the extent Harrelson was acting on behalf of Diamond M in its capacity as vessel owner.

[7] It is clear, utilizing the unerring 20/20 visual acuity always found in hindsight, that the work basket was dangerously faulty. The bottom had been welded to the underside of the frame instead of to the top of the frame. When the welds broke, there was nothing to restrain the bottom from falling, taking Richendollar with it. Richendollar was told to weld the hose rack on the starboard side. To do this he had to have a means of reaching the workside with his welding equipment. A work basket, tack-welded to the platform at the work area, was the apparent answer. If Diamond M furnished the faulty basket, it furnished Richendollar with an unsafe place to work and is liable. If Diamond M did not furnish a safe basket, but left Richendollar to rummage on his own, it failed to provide him with a safe place to work. In either instance Diamond M is guilty of vessel negligence.

Roy Harrelson, the man to whom the entire Diamond M rigging-up crew reported, from whom they all took orders, and who was the Diamond M representative responsible for safety on the DON E. McMAHON, either provided Richendollar with an unsafe basket or failed to provide him with a safe basket or to take other available safety precautions. This negligence is attributable to Diamond M either entirely as vessel owner or in part as vessel owner.

In either instance vessel negligence is extant and Diamond M is liable.

Diamond M contends that the trial court erred in the jury instruction on § 905(b), citing *Helaire v. Mobil Oil Corp.*, 709 F.2d 1031 (5th Cir. 1983). We find *Helaire* inapposite for the vessel owner there did not actively participate in the unloading operation during which the accident occurred. Diamond M was not only actively involved, it was doing the entirety of the work of rigging up the vessel during the course of which the accident occurred.

We conclude that there is sufficient evidence to support the jury's finding that Diamond M was negligent as owner of the DON E. McMAHON, and that its negligence was responsible for the injuries sustained by Richendollar.

C. *Remittiur*

[8] Richendollar contends that the district court abused its discretion in ordering a remittitur of $300,000. The record reflects that the remittitur was accepted. The issue is therefore not subject to appeal. *See, e.g., Donovan v. Penn Shipping Co.*, 429 U.S. 648, 97 S.Ct. 835, 51 L.Ed.2d 112 (1977); *Baltezore v. Concordia Parish, Sheriff's Dept.*, 767 F.2d 202 (5th Cir. 1985).

D. *Prejudgment interest*

Finally, Richendollar maintains that the court should have allowed prejudgment interest, arguing the applicability of maritime law, citing, *inter alia, Webster v. M/V MOOLCHAND, Sethia Liners, Ltd.*, 730 F.2d 1035, 1040 (5th Cir. 1984) ("Although the awarding of prejudgment interest lies within the discretion of the judge, 'the allowance of prejudgment interest in maritime law is the rule, rather than the exception.' "); *Helaire; Masters v.*

Transworld Drilling Co., 688 F.2d 1013 (5th Cir. 1982)(Awarding prejudgment interest "is well-nigh automatic in suits in the admiralty.").

In *Webster v. M/V MOOLCHAND* federal jurisdiction was based on diversity of the parties' citizenship, as in the case at bar. Plaintiff argued that state law was applicable and under the law of Louisiana money judgments typically bear interest from date of judicial demand. We demurred and held that since the situs of the injury was on a vessel in navigable waters, and the activity bore a substantial relation to maritime activity, "maritime rather than state law must apply." 730 F.2d at 1040. In the case at bar the accident did not occur on a vessel in navigable waters; as a consequence, the maritime rules are not necessarily preemptive. The result, however, of applying maritime law or Texas law should yield little difference.

In a recent landmark decision, the Texas Supreme Court overruled a long line of precedent and announced a rule allowing prejudgment interest on awards for damages accuring prior to the date of judgment. In *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 533-54 (Tex.1985), the court held:

> The time has come to revise the prejudgment interest rule to make injured parties whole and restore equity and symmetry to this area of the law. We therefore hold that, as a matter of law, a prevailing plaintiff may recover prejudgment interest compounded daily (based on a 365-day year) on damages *that have accrued by the time of judgment.* (Emphasis in original.)

[9] See also *Crown Central Petro. Corp. v. National Union Fire Ins. Co.*, 768 F.2d 632 (5th Cir. 1985). We remand for the allowance of prejudgment interest on that portion of the damages award which accrued prior to the

entry of judgment. It will be necessary for the court to separate the *globo* awards into that which had accrued and that which had not yet accrued as of the date of judgment, allowing appropriate prejudgment interest on the former.

AFFIRMED as to the liability of Baker and Diamond M; AFFIRMED as to the ruling remittitur; VACATED and REMANDED as to the disallowance of prejudgment interest.

CLARK, Chief Judge, concurring in part and dissenting in part:

The majority's discussion of jurisdiction leaves me with considerable doubt, but assuming the § 905(b) action against Diamond M was properly before the district court, no cause of action was proven. I respectfully dissent from that part of the majority opinion that affirms the resulting judgment of $1,031,015.

The unseaworthiness-indemnity circle created by *Sieracki/Ryan* subjected an employer who provided LHWCA coverage to both compensation payments and tort remedies. Accoridng to *Scindia*, in 1972 Congress "radically changed this scheme of things," and in doing so, provided a § 905(b) statutory right of action against a vessel for negligence. At the time of Richendollar's accident, the statutory right of action was limited thus:

> If [plaintiff] was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel.

The majority relies on *Pichoff* from this circuit and *Smith* from the second Circuit to affirm a right of tort

recovery against Diamond M, an employer who has already paid Richendollar $86,024 in LHWCA coverage. Both *Pichoff* and *Smith* are distinguishable in theory and in fact. The majority violates the exclusive remedy provision of the LHWCA when it fails to observe those distinctions here. The statutory remedy created under § 905(b) is a third party remedy. A principal purpose of the 1972 LHWCA amendments was to control tort recoveries against employers who provided compensation protection. That purpose is thwarted in this case.

Smith allowed a third party remedy against a vessel in a case in which the shipowner-employer also undertook to provide repair services with its own employees. In *Smith*, the president of the company that owned the vessel and employed the drowned diver was personally in charge of the repair operation which resulted in the diver's death. The Second Circuit observed, "[T]he key issue is whether the shipowner's employees who were at fault committed the negligent act in their capacity as agents of the vessel on the one hand or as employees performing . . . repair services on the other." The appellate court reversed the trial court's determination that all persons present at the scene of the fatal dive were engaged in the "single mission" of repair service. This reversal was based on the fact that the company president was in charge of the repairs and equally in charge of the vessel's normal operations. The failure of the vessel to provide the diver a safe place to work was not "at any time delegated to employees acting primarily as repairmen."

Based on *Smith*, this circuit in *Pichoff* affirmed a trial court finding that the vessel owner's general manager of all New Orleans yard operations was acting to further the corporate concern as vessel charterer when he ordered Pichoff to hurry his inspection work. Thus, the court observed it was rational and defensible to conclude that the

general manager's negligence was at least partly in his capacity as representative of the vessel owner and separate in identity from his capacity as supervisor of the repair work that injured Pichoff.

Neither *Smith* nor *Pichoff* apply here. Harrelson, the person in charge of the small group of employees that inclused Richendollar, was no more than a fellow servant. He was engaged in precisely the same limited single venture: "rigging up" the DON E. McMAHON. Employees of Diamond M were working on a structure standing on blocks on dry land. While the thing they were working on was classed as a vessel for some purposes, it was, as the majority observed, not capable of nivigation; therefore Harrelson could not have been in charge of its navigation. More significantly, Harrelson was not in charge of any operation of the DON E. McMAHON other than the "rigging up," nor was he representing Diamond M in any other capacity. He was employed by Diamond M solely to make the DON E. McMAHON functional. He was, indeed, set to accomplish a single mission, and Richendollar was engaged in that exact mission.

The sine qua non of § 905(b) statutory liability for vessel negligence is the presence of a vessel which admiralty regards as a separate entity district from its owner. Here, no such third entity existed. No president, no general manager acted for the DON E. McMAHON in ordering or permitting Richendollar to perform his work in an unsafe manner or at an unsafe place. No vessel negligence occurred. Harrelson's fault was the fault of a fellow shipbuilder or rigger-upper, if you will. Such negligence cannot be imputed to Diamond M under § 905(b).

APPENDIX B

Curtis Michael RICHENDOLLAR,
Plaintiff-Appellee,
Cross-Appellant

v.

DIAMOND M DRILLING COMPANY, INC.,
Defendant-Appellant,
Cross-Appellee

and

Baker Shipyards, Inc.,
Defendant-Appellee.

No. 84-2492.

United States Court of Appeals,
Fifth Circuit.

June 16, 1987.

Welder, who was injured in accident on jackup drilling rig under construction on land, brought action against employer for vessel negligence and brought Texas state law claim against operator of shipyard where rig was being constructed. The United States District Court, Southern District of Texas, Hayden W. Head, Jr., J., by jury verdict, exonerated operator but determined that welder was injured as consequence of vessel negligence. Both parties appealed. The Court of Appeals, 784 F.2d 580, affirmed in part and remanded. The Court of Appeals, Politz, Circuit Judge, held that: (1) rig was not "vessel," within admiralty jurisdiction of the federal courts, and (2) determination that rig was not "vessel" forclosed welder's claim for vessel negligence.

Affirmed in part and reversed in part.

Joseph J. Weigand, Jr., Weigand, Wiegand & Meyer, Houma, La., Bradford M. Condit, White, Huseman, Pletcher & Powers, Corpus Christi, Tex., for Diamond M Drilling Co., Inc.

Michael J. Samanie, Houma, La., for Richendollar.

Richard A. Schwartz, Thelm, Marrin, Johnson & Bridges, Houston, Tex., for Baker Shipyards, Inc. and Baker Marine.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL and JONES, Circuit Judges.

POLITZ, Circuit Judge:

This case occasions our reconsideration en banc of certain of our precedents involving the determination of maritime jurisdiction, and the requisites for a maritime tort action under 33 U.S.C. § 905(b). We reiterate today that when it enacted § 905(b), Congress did not create a new or broader cause of action in admiralty than that which previously existed, but rather, it curtailed available third party tort actions, and in doing so it neither expanded nor constricted maritime jurisdiction.[1] We hold that in order for a waterborne structure to qualify as a "vessel" under § 905(b), it must be a vessel for purposes of maritime

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[1] *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir. 1976), *cert. denied*, 430 U.S. 906, 97 S.Ct. 1175, 51 L.Ed.2d 582 (1977); *Christoff v. Bergeron Industries, Inc.*, 748 F.2d 297 (5th Cir. 1984); *May v. Transworld Drilling Co.*, 786 F.2d 1261 (5th Cir. 1986).

jurisdiction. Such a vessel must be capable of navigation or its special purpose use on or in water.[2] We further hold that to be cognizable under § 905(b), a tort must occur on or in navigable waters subject, of course, to the special provisions of the Admiralty Extension Act,[3] and there must be the traditional admiralty nexus.[4] As a consequence, we now reject the suggestion made in *Hall v. Hvide Hull No. 3*, 746 F.2d 294, 302-03 (5th Cir. 1984), that the pre-*Executive Jet/Foremost Insurance* test for a maritime tort was codified in § 905(b) by the 1972 amendments to the Longshore and Harbor Workers' Act. Further, we reject use of the statutory definition of vessel in the LHWCA as a basis for the definition of vessel under § 905(b), as was done in *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981), and overrule the holding in *Trussell v. Litton Systems, Inc.*, 753 F.2d 366, 367 (5th Cir. 1985), that a hull under contruction, located "on a building platform in a building-way within the shipyard," and not on navigable waters, was a vessel for § 905(b) purposes.

Background

Invoking admiralty and diversity jurisdiction, Michael Richendollar sued his employer, Diamond M

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[2] 1 U.S.C. § 3; *Offshore Co. v. Robinson*, 266 F.2d 769 (5th Cir. 1959); *Burks v. American River Transp. Co.*, 679 F.2d 69 (5th Cir. 1982).

[3] Involving torts consummated on land but caused by vessels on navigable waters. 46 U.S.C. § 740; *Margin v. Sea-Land Services, Inc.*, 812 F.2d 973 (5th Cir. 1987).

[4] *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982).

Drilling Company, for vessel negligence under § 905(b),[5] and Baker Marine Corporation, under Texas tort law, for injuries sustained in a fall. Baker operated a shipyard near Aransas Pass at Ingleside, Texas, and was building a jackup drilling rig for Diamond M. The rig, the DON E. McMAHON, was positioned on blocks, on land, and was approximately 85% complete on October 17, 1980, the date of Richendollar's accident. At that time, the rig had holes in its hull and was not capable of navigation.

By arrangement with Baker, Diamond M put a special crew aboard the DON E. McMAHON to prepare it for drilling operations. Richendollar, a welder on that crew, was injured when a wire screen basket he was using for a workbasket broke, causing him to fall from the rig. The basket was poorly designed and constructed. A fuller recitation of the relevant facts may be found in the panel opinion, *Richendollar v. Diamond M. Drilling Co., Inc.*, 784 F.2d 580 (5th Cir. 1986).

Trial was had to a jury which found that the jackup drill rig was a vessel under § 905(b), and that Richendollar was injured as a consequence of vessel negligence. The jury exonerated Baker. A divided panel of this court affirmed as to the liability of Baker and Diamond

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[5] The 1984 Amendments to § 905(b), applicable to injuries occurring after September 28, 1984, would bar this claim by Richendollar and all similar claims. LHWCA Amendments of 1984, Pub.L. No. 98-426, § 5(b), 98 Stat. 1639, 1641. That section provides:

> If such was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator or character of the vessel, no such [vessel negligence] claim shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or character) or against the employees of the employer.

M and remanded to the district court for assessment of prejudgment interest. The case was voted en banc, thus vacating the panel opinion. *See* Internal Operating Procedures following Local Rule 35. We now reinstate the panel opinion to the extent it affirmed the dismissal of the cliams against Baker, 784 F.2d at 584-86. However, we reverse the judgment against Diamond M, concluding that the DON E. McMAHON was neither a vessel for purposes of admiralty jurisdiction not for a § 905(b) vessel negligence claim.

Discussion

In *Parker v. South Louisiana Contractors*, we first addressed the import of the 1972 amendments to the LHWCA, particularly § 905(b). We were the first federal appellate court to do so. Parsing the language of the statute, which provided for suits against a vessel negligence, and searching the legislative history and jurisprudential developments leading to the legislation, we concluded that in enacting § 905(b), Congress did not "create a new or broader cause of action in admiralty," and that "[t]aken as a whole, the manifest purpose of section § 905(b) is to curtail rather than expand the availability of third party actions in admiralty." 537 F.2d at 117. We further concluded that "[w]ith respect to third-party actions for negligence, . . . the boundries of maritime jurisdiction as denied under prior law were neither expanded nor constricted by . . . the 1972 Amendments." *Id.* (citation omitted).[6]

The genesis of the claim permitted by § 905(b) is *The OSCEOLA*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903),

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[6] This decision has met with the uniform approval of our circuit colleagues. *See, e.g., Holland v. Sea-Land Service*, 655 F.2d 556 (4th Cir. 1981); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984); *Drake v. Raymark Industries, Inc.* 772 F.2d 1007 (1st Cir. 1985).

which recognized the warranty of seaworthiness to the crew of a vessel. This warranty was extended to longshoremen by *Seas Shipping v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), and *Reed v. The TAKA*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963). The ensuing *Sieracki* seaman litigation which, by virtue of the decision in Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), permitted an injured employee to recover compensation benefits and then indirectly impose on his employer responsibility for tort damages, led to the 1972 amendments. The pre-1972 claims were entirely maritime in origin. The post-1972 claims are likewise so cast.

Jurisdiction

[1] Admiralty jurisdiction of a tort claim depends on whether the plaintiff can establish a maritime tort. That inquiry is essentially fact-bound, turning on a detrermination of the location of the tort, the situs factor, and the pertinent activity, the nexus factor. Prior to 1972 the question was purely geographic: did the tort occur on navigable waters. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), added the requirement "that the wrong bear a significant relationship to traditional maritime activity," *id.* at 268, 93 S.Ct. at 504.

For purposes of jurisdiction, the configuration of the watercraft is of secondary importance, for, as the Supreme Court held at the turn of this century:

> Neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged.

The ROBERT W. PARSONS, 191 U.S. 17 (1903). This functional analysis is reflected in our lodestar definition of a vessel in *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), which includes not only conventional watercraft, but also "special purpose structures not usually employed as a means of transport by water but designed to float on water."[7] We reiterated that definition in *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973):

> Conventional ships and barges as well as such unconventional craft as submersible drillings barges and floating dredges which are designed for navigation and commerce are vessels within general maritime and Jones Act jurisdiction . . .

Whatever the configuration of the water-borne structure might be, for maritime tort jurisdiction it must be in or on navigable waters. In *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205, 92 S.Ct. 418, 421, 30 L.Ed.2d 383 (1971) (*citing Thomas v. Lane*, 23 F.Cas. 957 (C.C.Me. 1813) (Story, J.)), the Supreme Court restated the traditional rule:

> The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States.

The DON E. McMAHON was under construction on land at the time of Richendollar's accident. It was not in or

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[7] *Robinson* primarily addressed the definition of vessel under the Jones Act, but we also affirmed therein an unseaworthiness claim. In *Bernard v. Binnings Const. Co. Inc.*, 741 F.2d 824 (5th Cir. 1984), we held that the test for a vessel was the same under the Jones Act and the unseaworthiness doctrine.

on navigable waters. It was not a vessel within the admiralty jurisdiction of the federal courts under the long-standing jurisdictional rubric, and § 905(b) did not extend that jurisdiction. Accordingly, there is no admiralty jurisdiction.

Section 905(b) Vessel Negligence Claim

[2] Richendollar also invoked diversity jurisdiction for his § 905(b) vessel negligence calim and his Texas state law claim. The successful invocation of 28 U.S.C. §1332 jurisdiction suffices for the latter, but it does not carry the day for the former. As noted by Chief Judge Clark in the panel dissent, 784 F.2d at 589, "[t]he sine qua non of § 905(b) statutory liability for vessel negligence is the presence of a vessel which admiralty regards as a separate entity district from its owner."

We have concluded that the DON E. McMAHON was not a vessel for purposes of admiralty jurisdiction. That conclusion forecloses Richendollar's maritime tort claim, for if the DON E. McMAHON is not a vessel for purposes of admiralty jurisdiction, it is not a vessel for purposes of the § 905(b) vessel negligence claim. Richendollar's claim in this case for injury on land is not cognizable under § 905(b).

Conclusion

We conclude that the DON E. McMAHON was not a vessel for either admiralty jurisdiction or § 905(b) vessel negligence purposes at the time of Richendollar's accident, for it was then under construction, on land, and incapable of floatation and not on or in navigable waters, and capable of navigation or floatation for a special commercial purpose.

The judgment of the district court rejecting the demands against Baker Marine Corporation is AFFIRMED. The judgment against Diamond M Drilling Company is REVERSED.

APPENDIX C

LEGISLATIVE HISTORY
P.L. 92-574

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

P.L. 92-576, see page 1452

Senate Report (Labor and Public Welfare Committee)
No. 92-1125, Sept. 14, 1972 [To accompany S. 2318]

House Report (Education and Labor Committee)
No. 92-1441, Sept. 25, 1972 [To accompany H.R. 12006]

Cong. Record Vol. 118 (1972)

DATES OF CONSIDERATION AND PASSAGE

Senate September 14, October 14, 1972

House October 14, 1972

The House Report is set out.

HOUSE REPORT NO. 92-1441

. . .

at page 4701

ELIMINATION OF UNSEAWORTHINESS REMEDY

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the

industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 25[1] (1946) which held that the traditional seaman's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seaman. under the *Sieracki* case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even through the unseaworthiness was caused, created, or brought into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew responsible for creating the unseaworthy condition or was even aware

[1] 66 S.Ct. 872, 90 L.Ed. 1099.

of it. Further-more, in the example given above, under the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124[2] (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Commitee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party cliams involving injured longshoremen on the backlog of personal injury cases in that court.

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[1] 76 S.Ct. 232, 100 L.Ed. 133.

The Committee also has taken note of the inescapable fact that the controversity over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seaman if the vessel in unseaworthy does not apply with equal force to longshoremen and other non-seaman working on board a vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment

ashore, insofar as gringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nonenclature it may be called, such as "unseaworthiness", "nondelegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedoring or employees of stevedores subject to this Act. *Crumedy* vs. *The J.H. Fisser*, 358 U.S. 423,[3] *Albanese vs. Matts*, 382 U.S. 283,[4] *Skibinski vs. Waterman SS Corp.*, 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, *A. N. G. Stevedores vs. Ellerman Lines*, 369 U.S. 355,[5] *Blasingil vs. Waterman SS Corp.*, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co. vs. Peterson*, 347 U.S. 396,[6] *Italia Societa vs. Oregon Stevedoring Co.*, 376 U.S. 315,[7] or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety

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[3] 79 S.Ct. 445, 3 L.Ed.2d 413.

[4] 86 S.Ct. 429, 15 L.Ed.2d 327.

[5] 82 S.Ct. 780, 7 L.Ed.2d 798.

[6] 74 S.Ct. 601, 98 L.Ed.2d 798.

[7] 84 S.Ct. 748, 11 L.Ed.2d 732.

because the vessel will still be required to exercise the same care as a land-based person in providing safe place to work. Thus nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vesel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or know that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or empoyees of the stevedore.

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. SInce the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employee of the worker.

Furthemore, unless such bold-harmless, indemnity ro contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the procisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, dor such damages.

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the

fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410[8] (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371[9] (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independant contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligance of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independant contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "asssumption of rish" in an action by an injured employee shall also be applicable.

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[8] 83 S.Ct. 1349, 10 L.Ed.2d 448.

[9] 87 S.Ct. 1419, 18 L.Ed.2d 488.

Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety.

APPENDIX D

CONGRESSIONAL RECORD—SENATE

October 14, 1972 *at page 36272*

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THIRD PARTY ACTIONS

One of the most controversial and difficult issues in this bill concerns the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations. One proposal, originally advanced by the industry was that vessels should be treated as joint employers of longshoremen or other persons covered under this act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the act. This view was not accepted. We believe that where a longshoreman or other worker covered under this act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in nonmaritime pursuits are liable for damages when, through their fault, a worker in injured.

There is a present interpretation of the law that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping v. Sieracki,* 328 U.S. 25 (1946) which held that the traditional seamen's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the Sieracki case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of unseaworthy conditions even

though the unseaworthiness was caused, created, or brought into play by the stevedore—or an employee of the stevedore—rather than the vessel or any member of its crew. For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it. Furthermore, in the example given above, under the Supreme Court's decision in *Ryan Stevording Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the act which limits an employer's ability to the compensation and medical benefits provided in the act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

Given the improvent in compensation benefits which this bill would provide, it was our view that it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned as land-based third parties in nonmaritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in nonmaritime employment ashore, insofar as bringing a third party damage action is

concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as unseaworthiness, nondelegatable duty, or the like.

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to section 5 would still permit an action against the vessel for negligence. To recover he must establish that: first, the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or second, the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted in the bill, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—justs as they are in cases involving alleged negligence by land-based third parties. We intend that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land,

and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in nonmaritime pursuits liable under simliar circumstances.

The doctrine of the Ryan case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the sea worthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of section 5 of the act, by requiring indemnification from a covered employer for employee injuries.

Accordinglyy, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is intended to prohibit such recovery under any theory including, without limitation, theories based on contract or tort. Under the amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.

The committee recognized the need for special provisions to deal with a case where a longshoreman or ship

builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

It is not intended that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. Legal questions which may arise in actions brought under these provisions of the law should be determined as a matter of Federal law. In that connection, it is intended that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the admiralty rule which precludes the defense of assumption of risk in an action by an injured employee shall also be applicable.

SAFETY

Finally, I wish to emphasize that nothing in this bill is intended to relieve any vessels or any other persons from their obligations and duties under the Occupational Safety

and Health Act of 1970. Progress may have been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. I expect to see further progress in reducing injuries. It injuries are not reducted we may have to reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety.

I ask unamimous consent that the following telegrams of endorsement be printed in the Record.

The PRESIDING OFFICER. Without objection, it is so ordered.

New York, N.Y.